L. v. THE NETHERLANDS, no. 45582/99, ECtHR (Second Section), Decision of 30.09.2003

Trefwoorden

Document

EN

(Art. 8) Right to respect for private and family life – (Art. 14) Prohibition of discrimination

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(Art. 14) Prohibition of discrimination

Referenties

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Article 8
Article 14

Gerelateerde documenten

HUDOC Resolutie(s) - Executie

[EN] CASE OF L. AGAINST THE NETHERLANDS
[FR] AFFAIRE L. CONTRE LES PAYS-BAS

HUDOC Uitspraak(en) van de Kamer

[FR] AFFAIRE L. c. PAYS-BAS
[EN] CASE OF L. v. THE NETHERLANDS

HUDOC Persbericht(en)

[EN] Chamber judgments 01.06.04
[EN] Arrêts de chambre 01.06.04

Document text

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 45582/99

by L.

against the Netherlands

The European Court of Human Rights (Second Section), sitting on 30 September 2003 as a Chamber composed of:

Mr J.-P. Costa, President, Mr L. Loucaides, Mr C. Bîrsan, Mr K. Jungwiert, Mr V. Butkevych, Mrs W. Thomassen, Mrs A. Mularoni, judges, and Mrs S. Dollé, Section Registrar,

Having regard to the above application lodged on 2 December 1998,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, L., is a Netherlands national, who was born in 1975 and lives in Breda. He is represented before the Court by Ms E.J. Morée, a lawyer practising in The Hague.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant had a relationship with Ms B. from mid 1993. On 14 April 1995 a daughter, named A., was born to Ms B. and the applicant. Pursuant to Article 1:287 § 1 of the Civil Code (*Burgerlijk Wetboek*), as then in force, Ms B. obtained the guardianship (*voogdij*) of A. The applicant did not recognise (*erkenning*) A., but was appointed on 19 May 1995 by the Enschede District Court judge (*kantonrechter*) as A.'s auxiliary guardian (*toeziend voogd*). The applicant's auxiliary guardianship ended on 2 November 1995, when an amendment to the Civil Code entered into force abolishing the institution of auxiliary guardianship.

The applicant and Ms B. did not formally cohabit, but the applicant would visit her and A. on a regular basis. He also baby-sat and cared for A. a few times. Ms B. sometimes consulted the

applicant about A.'s hearing problems. In August 1996, the applicant's relationship with Ms B. broke down.

On 23 January 1997, the applicant requested the Almelo Regional Court (*arrondissementsrechtbank*) to grant him access (*omgangsregeling*) to A. one weekend every fortnight and some weeks during the holiday period. In these proceedings Ms B. argued primarily that the applicant's request should be declared inadmissible in that there had never been any family life within the meaning of Article 8 of the Convention between the applicant and A. and, insofar as family life had existed, that this had ceased to exist after the end of her relationship with the applicant. In addition, Ms B. argued that to grant the applicant access would not be in A.'s interests. Ms B. further submitted that the applicant had behaved badly towards her (violence and financial abuse) and had shown little interest in A. Finally, she indicated that A.'s hearing was impaired and that A. thus required a special approach of which she deemed the applicant incapable.

In its decision of 26 February 1997, the Almelo Regional Court accepted that there was family life within the meaning of Article 8 of the Convention between the applicant and A. and that this family life had not ceased to exist since the breakdown of the applicant's relationship with Ms B. It consequently declared the applicant's request admissible. However, given the difficulties between the applicant and Ms B., the Regional Court decided to order the Child Care and Protection Board (*Raad voor de Kinderbescherming*) to conduct an investigation and to report to it on the feasibility of an access arrangement.

Ms B. filed an appeal against this decision with the Arnhem Court of Appeal (*gerechtshof*). In its decision of 16 September 1997, the Court of Appeal quashed the decision of 26 February 1997 and declared the applicant's request inadmissible. In its decision, the Court of Appeal stated:

"3.1 Out of the parties' relationship (lasting from mid 1993 to August 1996) A. was born. The father is the biological father of A. He has not recognised the child. The mother holds the parental authority over A. by law. ...

4.5 In addition to what is stated under 3.1, the following, as contended by one side and not or insufficiently disputed by the other, has been established or become plausible.

The father was present at A.'s birth. He has never been formally registered at the mother's address, but (up to August 1996) has regularly visited the mother. He has also changed A.'s nappy a few times (*enkele malen*) and has baby-sat her once or twice (*een enkele keer*), but not since August 1996. Further, the mother has on several occasions (*verschillende keren*) had contacts by telephone with the father about (the hearing problems of) A.

4.6 In the light of the above facts and circumstances, it has been insufficiently established that the father has a close personal relationship with the child – who at the time of the break-down of the parties' relationship was one year old – or that there is a link between him and the child that can be regarded as "family life" within the meaning of Article 8 of the Convention. The further circumstances relied on by the father, from which it would appear that he has a close personal relation with the child, have – in contrast to the substantiated denial thereof by the mother – not been established. The terminology used by the mother in the proceedings (she spoke about "a relationship until October 1996" and "my ex-partner") cannot, either in itself or in connection with the above circumstances, lead to a different conclusion.

5.1 Based on the above considerations, the impugned decision is quashed, and the father's request is declared inadmissible."

The applicant's subsequent appeal in cassation was rejected by the Supreme Court (*Hoge Raad*) on 5 June 1998. The Supreme Court rejected the argument that the mere biological link between the applicant and A. was sufficient to attract the protection of Article 8 of the Convention. It held that "family life" for the purposes of Article 8 implied the existence of further personal ties in addition to biological paternity. As to the lack of existence of such further personal ties, it accepted the findings of the Court of Appeal.

B. Relevant domestic law and practice

Access rights are regulated by Articles 1:337a-h of the Civil Code (*Burgerlijk Wetboek*).

Article 1:377a of the Civil Code, insofar as relevant, provides as follows:

"1. The child and the parent who does not have custody are entitled to have access to each other (*omgang met elkaar*).

2. The judge shall, at the request of the parents or of one of them, establish an arrangement, for a definite or indefinite period, for the exercise of the right of access or shall deny, for a definite or indefinite period, the right of access.

3. The judge shall only deny the right of access if:

a. access would seriously impair the mental or physical development of the child; or

b. the parent must be deemed to be manifestly unfit for or manifestly incapable of access; or

c. the child, being at least twelve years old, when being heard has manifested serious objections against allowing the parent access; or

d. access would for another reason be contrary to the weighty interests (*zwaarwegende belangen*) of the child."

Article 1:377f of the Civil Code, insofar as relevant, reads as follows:

"1. Without prejudice to the provisions of Article <1:>377a <of the Civil Code>, the judge may, on request, establish an access arrangement between the child and the person having close personal ties with the child. The judge may reject the request where the interests of the child oppose granting it, or where the child, being at least twelve years old, objects to it."

According to the case-law of the Supreme Court, a request by a biological father for access to a child whose paternity he has not recognised is to be examined under Article 1:337f, and not under Article 1:337a of the Civil Code, in that he is not a "parent" within the meaning of Article 1:337a. Where the father of a child born out of wedlock has recognised the child, a request for access is to be examined under Article 1:377a of the Civil Code (*Hoge Raad*, 15 November 1996, NJ 1997, no. 423; and *Hoge Raad*, 26 November 1999, NJ 2000, no. 85).

In several cases in which a biological father claimed a right under Article 8 of the Convention of access to his child, the Supreme Court held that mere biological fatherhood in itself is insufficient to establish the existence of "family life" between a biological father and his child. According to the Supreme Court, such a relationship can only be regarded as involving "family life" where there are additional circumstances, such as regular contacts with the child, from which it ensues that the tie between them can be regarded as constituting "family life" (cf. *Hoge Raad*, 26 January 1990, NJ 1990, no. 630; *Hoge Raad*, 19 May 2000, NJ 2000, no. 545; and *Hoge Raad*, 29 September 2000, NJ 2000, no. 654).

According to the legal situation at the material time, a child born out of wedlock had the status of the natural child of its mother. It became the natural child of its father after having been recognised by the latter – the "father", for the purposes of this provision, being the man who recognised the child, whether or not he was the biological father (Article 1:221 of the Civil Code). A child born out of wedlock automatically had legally recognised family ties with its mother and her relatives. Recognition by the father entailed the creation of a legally recognised family tie between him and the child, as well as between the child and the father's relatives (Article 1:222 of the Civil Code).

Although Article 224 § 1 (d) of the Civil Code, as in force until 1 April 1998, stipulated that the recognition of a child was void without the mother's consent, the possibility was created in the case-law to replace the mother's consent by an alternative judicial consent. However, such alternative judicial consent could only be sought by a biological father whose relationship with his child was such that it should be considered as amounting to "family life" within the meaning of Article 8 of the Convention. On 1 April 1998, the possibility of seeking an alternative judicial consent was given a statutory basis by the introduction of the current Article 1:204 § 3 of the Civil Code. In the enactment of this provision, the legislator explicitly considered and rejected the idea that the possibility to seek alternative judicial consent should be limited to those cases where there was "family life" between the biological father and the child. Consequently, a request for alternative judicial consent is to be determined on the basis of balancing the

personal interests of those involved (see, *Hoge Raad*, 16 February 2001, *Rechtspraak van de Week* (Weekly Law Reports) 1989, no. 52).

The absence of recognition of a child does not absolve its biological father of his maintenance obligations towards this child. Pursuant to Article 1:394 of the Civil Code, the biological father of a not-recognised child remains liable to pay maintenance until the child has come of age. Until 1 April 1998, when this provision was amended as a consequence of the introduction of the possibility to seek a judicial declaration of paternity (*gerechtelijke vaststelling van vaderschap*, Article 1:207 of the Civil Code), the supposed biological father of an illegitimate not-recognised child was the man who had had intercourse with the mother between the 307th and 179th day before the birth of the child (Article 1:394 § 3).

COMPLAINTS

1. The applicant complained under Article 8 of the Convention that his request for access to A. has been unjustly rejected in that it was based on a finding that his relationship with A. could not be regarded as "family life".

2. The applicant further complained under Article 14 in conjunction with Article 8 of the Convention that this rejection amounted to discrimination, as the biological tie with his daughter was not accepted as constituting "family life", whereas the existence of "family life" is accepted by the Netherlands judicial authorities where a biological father has recognised his child.

THE LAW

1. The applicant complained that the rejection of his request for an arrangement for access to A. was contrary to his rights under Article 8 of the Convention. This provision, insofar as relevant, reads:

"1. Everyone has the right to respect for his ... family life ..."

The Government submitted that, under Dutch law, access arrangements may be made under Article 1:377a of the Civil Code between the child and a legal parent, and under Article 1:377f of the Civil Code between the child and a third person who has a close personal relationship with the child. The biological father is considered a legal parent if he is married to the child's mother or if he has recognised the child. In such a situation, the legal tie between the father and the child constitutes *ipso iure* family life within the meaning of Article 8 of the Convention.

A biological father having no legal tie with his child may nevertheless seek access to his child but, in order to obtain access, must have a close personal relationship with the child. The notion of "close personal relationship" is interpreted in the domestic case-law – as on appeal in the present case – as a tie between the biological father and his child which, on the basis of various and sufficient established circumstances, can be deemed to constitute "family life" within the meaning of Article 8 of the Convention.

According to the Government, this approach is in full conformity with the Court's established case-law under Article 8, from which it cannot be deduced that a mere biological tie would in itself already create a bond amounting to family life for the purposes of Article 8. In this respect, the Government referred to the Court's judgment in the case of *K. and T. v. Finland* in which it reiterated that the existence or non-existence of family life within the meaning of Article 8 of the Convention is essentially a question of fact depending on the real existence in practice of close personal ties (no. 25702/94, § 150, ECHR 2001-VII). The crucial question was therefore whether the applicant had adduced and satisfactorily established sufficient additional circumstances to render plausible his claim that the tie between him and A. constituted family life within the meaning of Article 8 of the Convention.

On basis of the findings of the Court of Appeal in its decision of 16 September 1997, which decision was upheld by the Supreme Court on 5 June 1998, the Government considered that the applicant had failed to do so. The Government therefore considered that the tie between the applicant and A. did not amount to family life under Article 8 of the Convention.

Consequently, the impugned decision could not be regarded as having infringed the applicant's rights guaranteed by that Convention provision.

The applicant submitted, relying on the Court's findings as to the existence of family life for the purposes of Article 8 in the cases of *Boughanemi v. France* (judgment of 24 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 607, § 35) and *C. v Belgium* (judgment of 7 August 1996, *Reports* 1996-III, p. 922, § 25), that the only important factor in determining the existence of "family life" is the tie between the applicant and A. already created by the mere fact that he is her biological father, without the need to rely on additional circumstances to demonstrate the existence of other bonds between them. According to the applicant, family life within the meaning of Article 8 of the Convention existed *ipso iure* between him and A. on grounds of his biological fatherhood.

In any event, the applicant pointed out that he was A.'s auxiliary guardian until the abolition of that institution on 2 November 1995. No objection had been raised by either Ms B. or the domestic court at the time concerning his appointment as auxiliary guardian. He further submitted that, according to the case-law of the Netherlands Supreme Court, the exercise of the duties of an auxiliary guardian may well make direct contacts with the minor child necessary or desirable (*Hoge Raad*, 22 February 1991, NJ 1992, no. 23), that the powers of the auxiliary guardian are not purely of a formal nature and that the exercise thereof is not completely detached from the child (*Hoge Raad*, 7 June 1991, NL 1992, no. 25). He argued that it clearly appears from various publications by learned authors that the social importance of an auxiliary guardian is greater than might be expected from his or her legal duties.

As to the question whether the family life between the applicant and A. had been broken by subsequent events, the applicant considered that the period of five months which elapsed between the termination of his relationship with A.'s mother and his request for access was insufficient to conclude that his bond with A. would have ceased to exist. In the applicant's opinion, the domestic decision declaring inadmissible his request for access to A. was therefore in violation of his right guaranteed by Article 8 to respect for his family life with her.

In light of the parties' submissions, the Court is of the opinion that this part of the application raises issues of fact and law that require an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant further complained under Article 14 in conjunction with Article 8 of the Convention that he has been discriminated against in that, for the purposes of an arrangement for access, his biological tie with A. was not accepted as constituting "family life", whereas the existence of "family life" is accepted by the Netherlands judicial authorities when a biological father has recognised his child.

Article 14 of the Convention reads:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Government submitted that, as the applicant's relationship with A. falls outside the scope of Article 8 of the Convention because it cannot be regarded as amounting to "family life", Article 14 of the Convention is inapplicable. Even in case it would apply, Dutch law makes no difference between a biological father who has recognised a child and a biological father who has not, since they can both apply for an access arrangement.

The applicant submitted that, although both categories of fathers may request an access arrangement, there is a discriminatory difference in treatment between them in that a father who has recognised his child is entitled to access although it can be denied on certain grounds, whereas a biological father who has not recognised the child is not entitled to access. The latter must first demonstrate that he has a close personal relationship with the infant. In the

applicant's opinion, there is no objective and reasonable justification for this difference in treatment.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

S. Registrar Dollé President

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European Court of Human Rights